No. 90-32

In The

Supreme Court of the United States

October Term, 1990

THE SECRETARY OF THE STATE OF FLORIDA, and THE STATE OF FLORIDA,

Petitioners,

v.

DIANN WALKER, LOUVENIA JONES, PEARLIE WILLIAMS, GRACIE HOLTON, ROSA HENDERSON, DELORES COLSTON, BARBARA KING, DOROTHY ROBERTS, JACQUELINE ROSS, LINDA ISAAC, and CHARLES STEWART,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under *McDonnell Douglas-Burdine* standards, may a defendant meet its articulation burden by merely contending it has a general policy of selecting the best qualified applicant and producing evidence of the personal characteristics of the plaintiff and the person selected, without producing any evidence of the specific reasons for its selection decision. In other words, is it sufficient for a defendant to provide the trial judge some part of the data which may have been available to and considered by the decision-maker, and allow the judge to determine whether any non-discriminatory rationale can be fashioned from the available data?*

2. After a discrimination case has been tried, and a defendant has pretermitted the *McDonnell Douglas-Burdine* order of proof by failing to rebut the inference of discrimination by providing a clear and reasonably specific explanation for the employment decision such that the plaintiff is afforded a full and fair opportunity to demonstrate pretext, whether the trial court should, nevertheless, proceed to decide the issue of intentional discrimination without regard to the defendant's failure of proof?

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* The Petitioners' statement of this issue is not fairly raised either by the evidence or by the decisions of the courts below.

PARTIES TO THE PROCEEDINGS

The Petitioners' description of the parties below is essentially correct. In addition, Clifford Simmons was on active duty in the United States Armed Forces at the time of trial. His claims were severed, and ultimately settled between the parties.

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The Respondents, Diann Walker, Louvenia Jones, Perlie Williams, Gracie Holton, Rosa Henderson, Delores Colston, Barbara King, Dorothy Roberts, Jacqueline Ross, Linda Isaac, and Charles Stewart, urge the Court to deny the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in this proceeding on February 6, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 893 F.2d 1189, and is reprinted in the Petitioners' Appendix at 1a. The memorandum decision of the United States District Court for the Northern District of Florida (Paul, Maurice M.) has not been reported, and is reprinted in the Petitioners' Appendix at 36a.

JURISDICTION

The Court's jurisdiction has been invoked by the Petitioners pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

28 U.S.C. § 1254(1)
[Reprinted in Petitioners' Appendix at 81a]

28 U.S.C. § 1291. Final decisions of district courts
[Reprinted in Petitioners' Appendix at 81a]

28 U.S.C. § 1331. Federal question jurisdiction
[Reprinted in Petitioners' Appendix at 82a]

42 U.S.C. § 1981. Equal rights under law
[Reprinted in Petitioners' Appendix at 82a]

42 U.S.C. § 1983. Civil action for deprivation of rights
[Reprinted in Petitioners' Appendix at 82a]

Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.
[Reprinted in Petitioners' Appendix at 83a]

Fed.R.Civ.P. 52(a). Findings by the court
[Reprinted in Petitioners' Appendix at 99a]

Fed.R.Evid. 301. Presumptions in General in Civil Actions and Proceedings
[Reprinted in Petitioners' Appendix at 95a]

Art. X. Contents of Writings, Recordings, and Photographs, Fed.R.Evid. 1001-1005
[Reprinted in Petitioners' Appendix at 96a]

STATEMENT OF THE CASE

Proceedings before the District Court:

The Applicants[1] invoked the jurisdiction of the federal district court under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., under 42 U.S.C. §§ 1981 and 1983, and pursuant to 28 U.S.C. §§ 1331 and 1334. The action was initially filed on June 19, 1979. At the time of trial, the amended complaint alleged individual incidents of disparate treatment, together with allegations of a pattern and practice of both disparate treatment and disparate impact. The pattern and practice claims included claims the Employer utilized an employment system in which predominately white supervisors were accorded wide latitude in making subjective decisions regarding hiring, promotion, evaluation and other terms of employment, and that the system thus facilitated ready expression of conscious and unconscious racial animus, and, additionally, had a disparate impact on black employees and applicants. The amended

[1] Petitioners' Statement of the Case is substantially correct. Our departures are noted below. To maintain some consistency with the Petitioners' brief, Respondents will be referred to as "Applicants", and the Petitioners will be referenced as either the "Employer" or the "Agency."

complaint also alleged the Employer utilized written employment examinations in making employee selection decisions, which had a disparate impact on black employees and were not justified by business necessity. (R4-203; App. 3a-5a).

The Employer's statement at p. 3 of the petition that the Applicants' claims were "predominantly promotional claims" is accurate in only the most technical sense. The employment system did not utilize classical lines of progression, in which an employee progressed from one job to another up the advancement ladder. Current employees and outside applicants generally competed with one another. The employment system recognized "appointments", with the character of the appointment dependent on the status of the selectee at the time of appointment. A current employee who received an appointment to a higher position received a "promotion appointment", whereas an outside applicant receiving the same position received an "initial appointment." Approximately two-thirds of the Applicants were seeking promotion appointments.

The case proceeded as a class action for approximately five years, but was decertified when the district court decided counsel were not financially able to adequately represent the class. (App. 3a). The Applicants had filed discovery motions, seeking to compel the production of data regarding written employment examinations, which they contended were a rich and relatively inexpensive source of applicant flow data, which could be used to prosecute the class claims. (App. 3a). The Applicants also sought the information, because relative scores on the

employment tests were used by decision-makers in making employment selections. (App. 18a). The motions remained pending for two years. Approximately three weeks prior to trial, Applicants filed an emergency motion requesting expedited treatment of the request for information on employment examinations. Four days prior to trial, the district court denied the request, holding employment examinations were not within the scope of the litigation. (App. 4a-5a).

At trial, each Applicant proved, at a minimum, that he or she was a member of a racial minority (black), that he or she applied for and was qualified for a specific job for which the employer was seeking applicants, that he or she was rejected and the Employer either continued to seek applicants of the same qualifications or filled the position with another applicant.[2] In most instances, the Applicants demonstrated the persons selected to fill the positions applied for were of the white race. (App. 6a). The Applicants also proved that the selection process was intended to be and is fundamentally subjective, and that the overwhelming proportion of persons making the hiring decisions were white persons. (App. 7a-8a).

Following Applicants' proof, the Employer produced no evidence which addressed the motivation or rationale

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[2] These facts apply to those claims which the Applicants appealed to the Court of Appeals. There were some claims concerning which the Employer provided a clear and reasonably specific explanation for the employment selection, and the district court's findings were not clearly erroneous. These were not submitted to the Court of Appeals, though at pp. 4 and 5, the Employer's petition continues to treat them as present.

for any of the employment selections at issue. (App. 6a-7a). The Employer's statements, beginning at page four of the petition, to the effect that it "asserted" or "contended" that its employment decisions were based on qualifications of the applicants is highly misleading. No witness testified regarding the motivation of the decision-maker or the rationale for the selection for any of the claims at issue. No witness even contended that any of the employment selections at issue were made on the basis of relative qualifications. The statements that the Employer "asserted" or "contended" that its decisions were based on qualifications can only refer to the arguments of its attorneys following the close of evidence.

The Employer's evidence consisted predominantly of information elicited through its principal personnel official. The personnel officer, who was first employed almost five years after this litigation began, testified it was the Agency's general practice to hire the "most qualified" applicant. There was no testimony as to what the Employer or the particular decision-maker considered as a "qualification." There was no testimony by any decision-maker that any of the employment decisions were made on the basis of the best qualifications. (App. 6a-7a). It is true, as stated at page four of the petition, that the Employer submitted a substantial quantity of documentary evidence, consisting primarily of the contents of personnel files, skeletal employment histories, performance evaluations, and job applications, including the applications of the individuals selected.[3] There was no

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[3] Job applications prepared by the selectees were admitted over objection, without any foundation, other than that they were received by the Employer, and without any evidence they were relied upon by the decision-makers.

evidence, however, that any decision-maker relied upon any specific parts of the documentary evidence, nor was there any evidence submitted with respect to the relative value of employment credentials revealed by the documentary evidence (education, particular kinds of work experience, etc.) to any of the jobs at issue.

It is true, as stated at pages four and five of its petition, that the Employer was able to cull from the often extensive work histories of several of the Applicants a limited number of incidents of inappropriate work behavior.[4] The Employer, however, submitted no testimony or other evidence that any of the incidents were relied upon by a decision-maker or formed the basis of the Employer's rationale with respect to any of the claims at issue.

The Employer has never argued at any point in this litigation that it was unable to obtain testimony from the decision-makers or submit other evidence of the specific reasons for each of the employment decisions at issue.

The trial court assumed, without deciding, that the Applicants established a prima facie case and ruled that the Employer had sufficiently met its burden of production. The district court held:

> In this case, the Defendant contends that the person believed to be most qualified was hired, unless friendship or political connections played some role. In every instance, the Defendant denies that race affected the decision. Making

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[4] Some of the examples given, however, do not relate to claims currently before the Court. Others have been mischaracterized.

> that statement satisfies the Defendants' light burden.

(App. 41a). The district court held the Employer met its burden of articulation by merely *contending* that the persons believed to most qualified were hired, and because it *denied* that race was a factor in its decision. (App. 9a-10a). Because of its view of the Employer's production burden, the district court criticized the Applicants' ability to respond to the Employer's evidence. The trial court then held Applicants had failed to demonstrate pretext, and entered judgment for the Employer on all of the claims. (App. 43a-80a).

Proceedings before the Eleventh Circuit:

Applicants invoked the jurisdiction of the Eleventh Circuit Court of Appeals, pursuant to 28 U.S.C. § 1291. The Circuit Court identified five issues which merited its attention on direct appeal: (1) Whether the Employer sufficiently articulated a legitimate non-discriminatory reason for each employment selection; (2) Whether the district court improperly discounted the expert testimony submitted by Applicants; (3) Whether the trial court erred in not recertifying the class; (4) Whether the trial court erred in excluding employment examinations; and, (5) Whether the district court erred in dismissing one of the individual claims. (App. 8a).

The Eleventh Circuit panel held the Employer failed to articulate a clear and reasonably specific legitimate non-discriminatory reason for each of the employment

selections at issue. "In not a single case, did the defendants offer proof by any person who made the employment decision, *or by any other person,* stating that the decision was made on the basis of what he or she thought demonstrated the best qualified person." (App. 11a; emphasis supplied). The Court reasoned the Employer's proof must be judged, in part, by the extent to which it fulfilled the function of framing the factual issue, so that the opposing parties would have a full and fair opportunity to demonstrate pretext. "[T]he defendants offered no evidence explaining any employment decision." (App. 12a-14a).

The statement of the Employer at pages 5 through 14, to the effect that the Circuit Court held the employer *must* submit the oral testimony of the actual decision-maker, is inaccurate. The Court held only that a defendant's articulation must address the employment selection in a way which explains with reasonable specificity why the particular selection was made. A simple statement that the defendant has a general policy of hiring the best qualified applicant will not suffice. (App. 11a-14a). The Court remanded to the trial court for an initial determination whether a *prima facie* case was established by any of the Applicants. (App. 14a).

The Eleventh Circuit determined the trial court improperly eliminated the issue of employment examinations from the litigation. It remanded to the trial court with respect to that issue, and for a further determination whether the class should be recertified. The Court also reversed the Rule 41(B) dismissal of one of the individual claims, and remanded. (App. 16a-19a). The Court determined the trial judge did not abuse his discretion in

rejecting the testimony of the Applicants' expert witness. (App. 16a).

WHY THE WRIT SHOULD BE DENIED

POINT 1

Under *McDonnell Douglas-Burdine* standards, may a defendant meet its articulation burden by merely contending it has a general policy of selecting the best qualified applicant and producing evidence of the personal characteristics of the plaintiff and the person selected, without producing any evidence of the specific reasons for its selection decision. In other words, is it sufficient for a defendant to provide the trial judge some part of the data which may have been available to and considered by the decision-maker, and allow the judge to determine whether any non-discriminatory rationale can be fashioned from the available data?

The Eleventh Circuit's decision in this case studiously follows the prescriptions of this Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 257, 101 S.Ct. 1089 (1981). In no sense did the Court of Appeals hold, as urged by the Employer, that the burden of production can only be met by the oral testimony of the actual decision-maker. The Appellate Court merely rejected, as insufficient under this Court's precedents, an articulation which consisted of "[i]n not a single case, . . . proof by any person who made the employment decision, *or by any other person*, stating that the decision was made on the basis of what he or she thought demonstrated the best qualified person." (App. 11a; emphasis supplied). The Eleventh Circuit panel was concerned, not

with who provided the Employer's evidence, but with the content and quality of the explanation given.

> Qualifications for selection of an employee can depend upon seniority, length of service in the same position, personal characteristics, general education, technical training, experience in comparable work or any combination of them. A mere statement that the employer hired the best qualified person leaves no opportunity for the employee to rebut the given reason as a pretext, which the employee must do if a proper reason is articulated.

(App. 12a).

The Eleventh Circuit's reasoning was right on point. The Employer's principal argument below was that it was "sufficient if they introduced evidence showing dissimilarities in two applicants' records so that the court could then decide which was better qualified." (App. 11a). The error in the Employer's approach is it ignores the fact that the *Burdine* formulation is calculated to deal with disparate treatment. The question is not whether a fair minded person might have reached the decision urged by the employer, but rather, whether the actual decision-maker was motivated by racial considerations.

The Employer's approach actually runs counter to the formulation under *Burdine*, which "is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine*, 450 U.S. at 254 n.8, 101 S.Ct. 1089 at 1094 n.8. The Employer's approach leaves the district court to sift through the evidence in search of an adequate rationale for the employment decision, since the explanation it requires is neither "clear [nor] reasonably specific." *Id.*, 450 U.S. at

258, 101 S.Ct. at 1096. Here, the Employer's evidence simply does not "bear [] on the critical question of [intentional] discrimination." *Furnco Construction v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949 (1978). The "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 717, 103 S.Ct. 1478, 1482 (1983), quoting *Burdine*, at 101 S.Ct. 1093.

The Court of Appeals did not hold in this case that a defendant must produce as evidence the oral testimony of the actual decision-maker, or that a defendant is limited, in making its articulation, to any particular character of admissible evidence. It held, simply, that the employer's explanation must be made through admissible evidence, not the contentions of its counsel after trial. The explanation must be clear and reasonably specific, and must address the reasons for the employment decision at issue.

The Employer's argument, at page 9 of the petition, that defendants will face an "impossible situation . . . where the actual decision-makers are unavailable, unable, or unwilling to testify" is not fairly presented by this case. The Employer never even suggested below that any of the decision-makers of selections at issue here were unavailable, unable or unwilling to testify at trial. Indeed, although the issue was never mentioned in the trial court, the record incidentally indicates that a number of the decision-makers were, in fact, available, and suggests the evidentiary shortfall was a calculated trial tactic. Moreover, the Employer's personnel system is peculiarly suited to permit it to produce, whenever necessary,

admissible evidence of the reasons for selection decision other than the testimony of the decision-makers. Under the Employer's structured selection process, applications are accepted by the personnel office only from persons deemed qualified. These are placed in a selection packet, together with a listing of the applicants, which also contains data on race, sex, national origin, and other characteristics, and is provided to the decision-maker. The decision-maker interviews applicants, makes his selection, records his notes on the appropriate sheet, and returns the packet to the personnel office, where it is thereafter maintained. Florida's public records act, Chapter 119, Florida Statutes, prevents routine destruction. (Plaintiffs' Trial Exhibit Z51-B pages 13-30). These and similar records are available or adaptable to meet the exigencies described by the Employer.

The decisions of other circuits set forth in the Employer's petition at pages 10-12 do not conflict with the decision in this case. In each instance, the argument proceeds on the erroneous presumption the Eleventh Circuit limited evidence to the oral testimony of the decision-maker. The Fifth Circuit's decision in *Bernard v. Gulf Oil Corp.*, 890 F.2d 735 (1989), does not fairly address the issue. In *Bernard*, the plaintiffs did not prove they had applied for jobs by "expressing interest", and thus failed to establish a *prima facie* case. The court's "arguendo" determination that the defendant sufficiently articulated is both dicta, and logically inconsistent. *Id.*, at p. 745. In *Mills v. Ford Motor Co.*, 800 F.2d 635 (6th Cir. 1986), the district court found the defendant had sufficiently articulated its reasons by producing evidence of its policy of

terminating supervisors with two unsatisfactory evaluations, together with the employee's evaluations, although the decision-maker did not testify. The decision is not inconsistent with this case. Likewise, the decision in *McDonald v. United Airlines, Inc.*, 745 F.2d 1081 (7th Cir. 1984), is not only consistent with this case, it supports the decision below. As in this case, mere argument of counsel was insufficient. *Mitchell v. Baldrige*, 759 F.2d 80 (D.C. Cir. 1985), addresses circumstances in which the district court may grant a Rule 41(B) motion following the close of plaintiff's case, though the plaintiff may have proven a *prima facie* case. *Mitchell* is consistent since the court clearly required an articulation by the defendant during the course of plaintiff's case, and a specific finding by the court that the plaintiff had fair notice of the articulated reason and a full opportunity to rebut it. The decision in *Gray v. Univ. of Arkansas at Fayetteville*, 883 F.2d 1394 (8th Cir. 1989), illustrates the soundness of the decision below, rather than conflicts with it. In *Gray*, the court held a defendant may meet its articulation burden by giving false reasons for its actions, thereby requiring the plaintiff to establish pretext. Giving even false reasons[5] serves the dual purposes for requiring a defendant to articulate. It serves to frame the factual inquiry and rebut the *prima facie* presumption, and it affords the plaintiff an opportunity to demonstrate pretext. In this case, the Employer submitted no reasons for the employment decisions.

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[5] Of course, if the defendant openly admitted the reasons were false, pretext would be established.

POINT 2

After a discrimination case has been tried, and a defendant has pretermitted the *McDonnell Douglas-Burdine* order of proof by failing to rebut the inference of discrimination by providing a clear and reasonably specific explanation for the employment decision such that the plaintiff is afforded a full and fair opportunity to demonstrate pretext, whether the trial court should, nevertheless, proceed to decide the issue of intentional discrimination without regard to the defendant's failure of proof?

The Employer's argument, beginning at page 14 of the petition, that after a case is "fully tried", the court should dispense with the constituent parts of the *Burdine* analysis, even when the defendant does not provide an explanation for its actions, fails to account for the evidentiary function of the requirement that a defendant articulate.

The plaintiff's *prima facie* case serves the important function of "eliminat[ing] the most common nondiscriminatory reasons for the plaintiff's rejection." *Burdine*, at 101 S.Ct. 1094. After the plaintiff establishes a *prima facie* case, the burden passes to the defendant to "rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason." *Id.* The defendant's articulation serves the important functions

> to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Id., at 101 S.Ct. 1095. The sufficiency of the defendant's articulation is to be judged by the extent to which it fulfills the foregoing functions. *Id.* Where the defendant fails to meet its light burden of explaining the reasons for its actions, however, the litigation cannot be considered to have been "fully tried", as urged by the Employer, because the failure of the defendant to articulate denies the plaintiff an opportunity to demonstrate pretext. "[I]f the employer is silent in the face of the presumption [created by plaintiff's *prima facie* case], the court must enter judgment for the plaintiff because no issue of fact remains in the case." *Id.*, at 101 S.Ct. 1094.

In this case, the Employer submitted no evidence of the reasons for any of the employment decisions at issue. Notwithstanding the dissent below, this is not a case in which the rationale for the employment selections was reasonably discernable by the Applicants. Even had the Applicants assumed the Employer relied upon "qualifications", they had no method to discern what each decision-maker considered a "qualification", or what qualifications were pivotal in the selection for each job at issue.[6] Neither the Applicants, nor the district court, received any explanation from the Employer from which to determine why the employment selections were made.

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[6] Even with respect to the few incidents of inappropriate behavior culled by the Employer from several of the Applicants' employment records, the Applicants had no basis from the circumstances of their applications or the evidence at trial to believe the incidents played a role in the employment decisions.

Because the Employer stood silent in the face of Applicants' *prima facie* case, the action was not "fully tried." The Eleventh Circuit correctly distinguished this case from *Aikens*.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Eleventh Circuit should be denied.

Respectfully submitted,

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